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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 710.

WILLIAM RUCKER, WILLIAM BUTLER,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

MONROE G. MARKS,
Standard Bldg., Cleveland, Ohio,
Attorney for Petitioners.

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 3

Statement 3

Argument 5

Reasons for Granting the Writ 7

Conclusion 9

APPENDIX:

Quotations From Trial Record 10

Journal Entry of the Court of Appeals of Cuyahoga County 11

Judgment of the Supreme Court of Ohio 11

TABLE OF AUTHORITIES.

Cases.

Miller vs. United States, 300 Fed. 529 7

Reynolds vs. United States, 280 Federal 1 8

State vs. Billotto, 104 Ohio State 13 7

State vs. Crowley, 94 Ohio St. 88 7

Vaux's Case, 4 Co. Rep. 44a 7

Constitution.

Constitution of the United States:

Amendment Five 2

Amendment Six 2

Statutes.

Ohio Revised Code:

Sec. 3719.09

Sec. 3719.20(A)

Sec. 3719.101

28 U. S. C. 1257(2) and (3)

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To the Supreme Court of Ohio.

Counsel for the petitioners, William Rucker and William Butler, on their behalf, prays that a writ of certiorari issue to review the decision of the Ohio Supreme Court affirming a judgment of the Court of Appeals for Cuyahoga County, Ohio, and the judgment and sentence of the Court of Common Pleas of Cuyahoga County, Ohio rendered on or about the thirteenth day of November, 1956 and affirmed in the Supreme Court of Ohio on or about the ninth day of October, 1957.

OPINIONS BELOW.

None of the Court below wrote opinions or memorandums, reported or unreported.

JURISDICTION.

The jurisdiction of this Court is invoked on the basis that the state court, The Supreme Court of Ohio, has decided questions of federal importance involving the constitutional rights of the Appellants, some of which have not

heretofore been decided and determined by this Court, and some of which were in opposition to the determinations of this Court in applicable decisions. That substantial rights of the petitioners have been violated as a result. The judgment of the Supreme Court of Ohio was rendered on or about October 9, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2) and (3).

QUESTIONS PRESENTED.

The questions presented here are many and are here set forth in as short and accurate a manner as possible.

1. Were the appellants' rights under Amendment Five of the United States Constitution violated as respects:

(a) their rights not to be tried twice for the same offense, when they were charged under two statutes for the same act, and where the two statutes are a greater and lesser degree of the same crime, and where one is an included offense within the other.

(b) their rights under the due process provision, when the trial court permitted testimony to be considered by the jury which concerned a third person only, jointly indicted, but discharged by the court at the close of the State's evidence, and which had no connection whatsoever to the appellents.

2. Were the appellants' rights under Amendment Six of the United States Constitution violated, as respects their right to be confronted by their accuser, and to have the right to cross examine said accuser, when testimony of a witness not present was permitted by the trial judge through third persons who related the testimony of the missing witness?

3. Were the rights of the appellants under the Fourth Amendment of the United States Constitution violated when Federal Agents of the Treasury Department seized and searched the automobile of the Appellant Rucker without a warrant, although they had sufficient time to obtain one had they desired?

STATUTES INVOLVED.

The Statutes of the Ohio Revised Code which are involved in this appeal are as follows:

> Section 3719.09 "No person * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted under the provisions of Section 3719.15 of the Revised Code * * *"
>
> Section 3719.20(A) "No person shall (A) Possess for sale a narcotic drug except in accordance with the provisions of Sections 3719.01 to 3719.22, of the Revised Code * * *"

(Only the pertinent portions of the Statutes, under which the indictments are based are here quoted and set forth.)

STATEMENT.

The appellants were arrested in Cleveland, Ohio, on or about August 17, 1956, and charged with violations of the Narcotics Law of Ohio. They were arraigned in the Cleveland Municipal Court and subsequently indicted by the Grand Jury of Cuyahoga County on September 25, 1956, and entered a plea of not guilty to the counts of the indictment charging three separate offenses growing out of the same act alleged. These counts were for violation of the following sections of the Revised Code: 3719.09, 3719.101, 3719.20(A).

Trial was held before the Honorable Felix Matia on or about November 13, 1956, with the jury returning a verdict of guilty on all counts against the Appellant Rucker and a verdict of guilty to the counts charging violation of 3719.09 and 3719.101 against the Appellant Butler, and a verdict of not guilty against Appellant Butler on the charge of violation of 3719.20(A). Both appellants were sentenced on all counts concurrently. On the 3rd day of May, 1957, the Court of Appeals for Cuyahoga County, Ohio, sustained the judgment of the Common Pleas Court.

The facts involved herein are rather lengthy and involved, but briefly, the witness who was not called testified that after Appellant Rucker had visited a gasoline station at East 70th Street and St. Clair Avenue, in the City of Cleveland, he found in the washroom, both men's and women's, a package of what was later testified was narcotics. Appellant Butler was later in the station and left. Rucker and Butler both returned later in each other's company, and the Federal agents arrested them in Rucker's car with, allegedly, one packet of heroin on the floor of the car, which is identified as the same packet in the men's room earlier.

ARGUMENT.

Throughout the trial, counsel constantly objected to admission of hearsay evidence and took his exceptions, and objected before and after the court's charge to the jury, and asked the court to charge that they must not consider this evidence, and also that they must not consider evidence introduced only as concerns the third person who was no longer in this case as a result of having been discharged upon defense motion at the close of the State's case in chief.

Objections were also raised throughout the trial and before and after the court's charge and by many motions which were overruled concerning the other questions here raised.

These objections, motions and exceptions make up a considerable portion of the rather lengthy trial record which is herewith filed in its original form (one copy only) directly from the Supreme Court of Ohio. Counsel hesitates to burden the court with many pages of quotations from the record inasmuch as the questions here raised are also raised in the Supreme Court of Ohio, based upon the same objections and exceptions here complained of. These objections are set forth in the Supreme Court as "Assignments of Error" on page one of the Defendants-Appellants' brief in that Court.

All objections were overruled and all affirmations by Supreme Court of Ohio and Court of Appeals for Cuyahoga County were done without opinion or memorandum. Appended hereto in the Appendix are quotations from the trial transcript which give some examples to the court that objections and exceptions to the violations here complained of were properly and timely made, without burdening the court with page after page of this type of quote.

Copies of all judgments, and orders are filed herewith as originals with documents forwarded from the Supreme Court of Ohio.

Briefly appellants complain here of the conduct of the trial court in permitting State's witness to testify as to things seen and done by a man named Schultz who was never brought to the trial to testify to these things himself. Without his "evidence" the appellant could not have been found guilty. To overcome his unavailability, or his not being present for whatever reason, the State elicited from three other persons what this man would have testified to had he been present himself, although these facts were not within the knowledge of the witnesses tstifying.

Further, the court permitted evidence of the complicity and guilt of a third person charged in the joint indictment during the State's case in chief. At the conclusion of the State's case, the trial judge discharged the third defendant. At this point and thereafter, Counsel requested that this evidence which could by no stretch of the imagination be applied to the appellants be stricken and the jury instructed how they were to consider, if at all, this evidence. The court did refuse, and the evidence went to the jury for their consideration, with instruction.

Counsel further moved that the prosecution be required to elect which of the crimes they wished to proceed upon, as charged in the indictment since two of the three offenses charged were greater and lesser degrees of the same offense. The court did refuse, and appellant Rucker was convicted of both degrees, and sentenced upon both.

Federal Narcotics Squad Agents were the arresting officers, and elected to turn the appellants over to the City Police to have them charged under State Statutes. These agents were apprised of the commission of a crime some

three hours before arrest. They made the arrest while the courts were in session, and yet knowing that they would probably have to make a search and arrests failed to obtain warrants prior to the search of appellant Rucker's car, and for arrest of appellants, although they could easily have done so.

REASONS FOR GRANTING THE WRIT.

"The life of a man shall not be twice put in jeopardy for one and the same offense." (*Vaux's Case*, 4 Co. Rep. 44a.) This is the basis for our Constitutional prohibition. This Court has zealously guarded this principle through the years. In the instant case, the Appellants have been charged twice with commission of the same offense so as to have placed them twice in jeopardy. All acts alleged to have been committed by appellants took place at the same instant, and involved possession of a single packet of narcotic drugs. For this possession they were charged with two separate crimes, one of which is a lesser included offense of the other. (See Statutes involved.)

The law in Ohio as well as in this Court is clearly that if the defendant upon the first charge could have been convicted of the offense in the second then he has been in jeopardy. (*State vs. Billotto*, 104 Ohio State 13.) (*State vs. Crowley*, 94 Ohio St. 88.) (*Miller vs. United States*, 300 Fed. 529.) A judgment on an indictment alleging in general terms every fact necessary to constitute an offense is a bar to subsequent prosecutions for any offense which could have been proved under that indictment. In the *Miller* case above, the court said,

> "where an act of possession was merely that necessarily incidental to a sale a sentence for sale of intoxicating liquors and possession thereof constituted a double punishment for the same act."

This is precisely the state of the evidence in the instant case. Appellants were charged with both possession, and the same possession for the purpose of sale. The same evidence was required to sustain both crimes, and appellants were charged with and tried on both crimes, one of the appellants being convicted on both charges.

In *Reynolds vs. United States*, 280 Federal 1, the court said that:

> "Defendant could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors and the other possession of the implements and materials designed for manufacture of such liquor * * * although she (the Defendant) did not require the government to elect."

Upon trial Defendants were required by court ruling to defend themselves upon evidence introduced concerning a third party not a defendant at the conclusion of the case. Great quantities of narcotics were found in the Ladies' washroom of a gasoline station, and introduced into evidence for the sole purpose of implicating a woman subsequently discharged by the trial court upon motion at the conclusion of the State's case in chief. The appellants are both men, and there was no evidence or claim by the prosecution that they placed same there. Yet the jury without any instruction whatsoever was permitted to consider that evidence in deciding this cause.

An individual named Schultz, who never appeared for examination, saw certain things and did certain things prior to the arrest of the appellants. What he did and saw was testified to by other persons, without the opportunity being afforded to appellants of examining this individual who was in effect their accuser, in that what he saw and did constituted the State's case.

Appellants were in this case required to hurdle great obstacles placed in their paths, beyond normal. As a result, the rights afforded those charged with crime under the Constitution of this Country were abused and violated, and this Court should review the judgment of the Ohio Courts.

CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

MONROE G. MARKS,

Attorney for Petitioners.

APPENDIX.

QUOTATIONS FROM TRIAL RECORD.

The following are quotations from the trial record.

Page 330:

"Mr. Marks: I am at this time requesting the court to charge the jury as concerns the defendant Macy Bullock, and to instruct the jury not to consider any testimony as regards her in determining the guilt or innocence of the other two defendants.

The Court: Overruled.

Mr. Marks: Note my exceptions."

Page 311:

"Mr. Marks: If the court please, at this time I move that the court withdraw from the consideration of the jury State's Exhibit 1. (The narcotics found in the ladies washroom.)

The Court: (on page 313) Both motions are overruled."

Page 330:

"Mr. Marks: I want to ask the court to instruct the jury that the first count of the indictment is an included offense in the second count and that they cannot be found guilty of both.

The Court: Overruled."

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY.

Dated: May 3, 1957.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellants and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellants except.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(No. 35235—Decided October 9, 1957.)

APPEAL from the Court of Appeals for Cuyahoga County.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT and HERBERT, JJ., concur.

MATTHIAS, J., not participating.